

OPINION NO. 85-007**Syllabus:**

In the exercise of duly-authorized functions relating to the procurement and expenditure of the Federal Alcohol, Drug Abuse, and Mental Health Services Block Grant, and absent direction to the contrary from the federal government, the Director of Mental Health may interpret Section 1916(c)(14) and (15) of the Federal Public Health Service Act, as amended by the Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984, Pub. L. No. 98-509, §§103, 106, 98 Stat. 2353, as permitting the expenditure of the percentages of funds indicated therein for the expansion of existing services or programs to clients for whom services were not previously available, and may construe such Section 1916(c)(14) and (15) as permitting expenditures meeting the annual percentage requirements set forth in Section 1916(c)(14) and (15) to occur over a period of two fiscal years.

To: Pamela S. Hyde, Director, Ohio Department of Mental Health, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 5, 1985

You have asked for an opinion concerning recent federal changes to the Alcohol, Drug Abuse, and Mental Health Services (ADMS) Block Grant. As amended by the Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984, Pub. L. No. 98-509, §§103, 106, 98 Stat. 2353, Section 1916 of the Federal Public Health Service Act (to be codified at 42 U.S.C. §300x-4) currently reads, in relevant part, as follows:

(c) As part of the annual application required by subsection (a) of this section, the chief executive officer of each State shall certify as follows:

....

(14) Of the amount allotted to a State under this part in any fiscal year, the State agrees to use not less than 5 percent of such amount to initiate and provide new alcohol and drug abuse services for women.

(15) Of the [amount] to be used in any fiscal year for mental health activities, the State agrees to use not less than 10 percent of such amount to initiate and provide (A) new mental health services for severely disturbed children and adolescents, and (B) new comprehensive community mental health programs for underserved areas or for underserved populations.

Your questions are these:

1. How should the statement, "initiate and provide new", found in each requirement be interpreted? Do the terms "initiate" and "new" imply programs and/or services that did not exist prior to the effective date of the new requirements? Or can "initiate" and "new" refer to expansion of existing programs and/or

services to clients for whom services were not previously available?

2. Can expenditures meeting the 5 and 10 percent annual requirements occur over a two-federal-fiscal-year period? Section 1914(a)(2) [42 U.S.C. §300x-2(a)(2)] allows this for the expenditure of Block Grant funds. This provision states that, "any amount paid to a State for a fiscal year and remaining unobligated at the end of such year shall remain available to such State for the purposes for which it was made for the next fiscal year."

You have indicated that you have received no guidance on these questions from federal officials and that you have, in fact, been told to expect no such guidance. See 42 U.S.C. §300x-4(c) ("[t]he Secretary may not prescribe for a State the manner of compliance with the requirements of this subsection").

Let me note, first, that I have neither the capacity to provide authoritative interpretations on questions of federal law, see, e.g., 1982 Op. Att'y Gen. No. 82-097 at 2-270 n. 7; 1982 Op. Att'y Gen. No. 82-071, nor the authority to exercise on behalf of another state official discretion which has been delegated to him, see generally State ex rel. Copeland v. State Medical Board, 107 Ohio St. 20, 140 N.E. 660 (1923); State ex rel. Commissioners of Franklin County v. Guilbert, 77 Ohio St. 333, 83 N.E. 80 (1907); 1984 Op. Att'y Gen. No. 84-098; 1984 Op. Att'y Gen. No. 84-067. Thus, where there is no definitive interpretation on a matter of federal law, I am able to advise only whether your adoption of a particular interpretation appears to be consistent with your duty to carry out your responsibilities under the law of this state. See R.C. 109.12 ("[t]he attorney general, when so requested, shall give legal advice to a state officer. . . in all matters relating to [his] official duties"). See generally State ex rel. Hunt v. Hildebrandt, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), aff'd, 241 U.S. 565 (1916) (where no direction has been given, an officer "has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method" of performing his duties). Assuming, then, that you have been given responsibility for administering the ADMS Block Grant for the State of Ohio, see generally Am. Sub. H.B. No. 291, sections 42 and 59 (uncodified), 115th Gen. A. (1983) (eff. July 1, 1983) (appropriating ADMS Block Grant funds to the Departments of Health and Mental Health), I turn to your specific questions.

Your first question concerns the requirement of Section 1916(c)(14) and (15) that the state shall use a certain percentage of the funds which it receives to "initiate" and provide "new" services and programs of the specified types. You have asked whether this language may be read to include the expansion of existing programs or services to clients for whom services were not previously available.

Use of the words "initiate" and "new" in the federal law clearly indicates that the percentages in question may not simply be expended for the costs of providing services and operating programs which are identical to those which were provided or operated during the preceding year. See Webster's New World Dictionary 725, 957 (2d college ed. 1978) (defining "initiate" as "to bring into practice or use; introduce by first doing or using; start"; defining "new" as "never existing before; appearing, thought of, developed, made, produced, etc. for the first time"). It is, however, not clear that the language of Section 1916(c)(14) and (15) requires that the funds be expended only for services or programs that did not exist prior to the effective date of that language. You have proposed an interpretation of the relevant language which would permit the use of the specified funds to initiate the expansion of existing services or programs to clients who did not previously receive them. With respect to such clients, the services or programs would clearly be "new." The expansion of existing services or programs may be viewed as the initiation of an expanded version of such services or programs. Thus, such an interpretation appears to be a reasonable reading of the language of Section 1916(c)(14) and (15).

Rejection of the interpretation which you have proposed might, in fact, serve to penalize states which established comprehensive programs prior to the enactment of the 1984 amendments to the Public Health Service Act. A provision

of that Act which was not affected by the 1984 amendments authorizes the expenditure of ADMS Block Grant funds, among other purposes, for "planning, establishing, maintaining, coordinating, and evaluating projects for the development of more effective prevention, treatment, and rehabilitation programs and activities to deal with alcohol and drug abuse" and for grants to community mental health centers for the "[i]dentification and assessment of severely mentally disturbed children and adolescents and provision of appropriate services to such individuals" and "[s]ervices for identifiable populations which are currently underserved in the State." 42 U.S.C. §300x-3(a)(1)(A); 42 U.S.C. §300x-3(a)(1)(B)(ii), (iv). A state which funded such purposes prior to the adoption of the 1984 amendments may have established sound programs and may have some difficulty in coming up with a completely novel approach to these problems. It would clearly be nonsensical to construe Section 1916(c)(14) and (15) as requiring a state to institute completely new programs, rather than permitting it to draw upon its prior experience by modifying or expanding services or programs which it has found to be successful.

Further, the interpretation which you have proposed is consistent with the legislative history of Pub. L. No. 98-509. H.R. Conf. Rep. No. 98-1123, 98th Cong., 2d Sess. 20-21, reprinted in 10A U.S. Code Cong. & Ad. News 4022, 4027-28 (Dec. 1984), states, with respect to the amendment pertaining to alcohol and drug abuse services for women:

The Conference Agreement incorporates the House provisions, with an amendment requiring that each State, as a condition of receiving Alcohol and Drug Abuse and Mental Health Services Block Grant funds, assure that it will allocate not less than 5 percent of its total block grant allotment to initiate and expand alcohol and drug abuse services for women.

The conferees agree that alcohol and other drug abuse is a rapidly growing problem among women. It is the intention of the conferees that each State use its funds to initiate a broad range of new and expanded services for women.

The conferees are aware that States may already support programs providing alcohol and drug abuse services to women with Alcohol and Drug Abuse and Mental Health Services Block Grant funds or other sources of funding. Funds available through this amendment are intended to be used to expand the availability of substance abuse services for women within the State, and the conferees expect States to place special emphasis in allocating these funds upon the development of new programs.

The conferees do not intend that States use Alcohol and Drug Abuse and Mental Health Services Block Grant funds earmarked for these new activities to supplant State or local funding of related activities as a means of compliance. . . .

The conferees believe that each State should determine the appropriate mix of new alcohol and drug abuse services available for women based upon local needs. The conferees note that the development of separate and discrete treatment services in outpatient settings, costs [sic] effective residential facilities such as halfway houses, and employee assistance programs in female intensive industries should be supported. In developing new treatment services, special consideration also should be given to those programs with the capability to care for the children of women in treatment. States should be responsive to the need for programs which address the subpopulations of women alcoholics and drug addicts, including victims of violence, the elderly, minorities, youth, homemakers, and pregnant women. (Emphasis added.)

But see 42 U.S.C. §300x-7(a)(2) ("[n]o person shall on the ground of sex or religion be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available under this part").

The same report discusses the requirement pertaining to new mental health services for severely disturbed children and adolescents and new comprehensive community mental health programs for underserved areas or populations, as follows:

The Conference Agreement incorporates a House provision with an amendment to require each State to assure that 10 percent of its mental health allotment is used for new services for severely disturbed children and adolescents and used to establish new comprehensive community mental health services for unserved or underserved areas or groups.

The conferees agree that there are many geographical areas and population groups that receive inadequate or no mental health services at the present time. It is the intent of the conferees that each State use the funds provided under this provision to initiate new services where previously there were none, so as to expand the State's comprehensive mental health services.

Of the new services that States may provide in fulfillment of this provision, the conferees intend that special emphasis be given to new services for seriously disturbed children and adolescents. Recent studies have indicated that two out of three seriously disturbed children and adolescents receive no care. Among children with multiple problems or without supportive home environments even fewer receive care.

The conferees do not intend that States use Alcohol and Drug Abuse and Mental Health Services Block Grant funds earmarked for these new activities to supplant State or local funding of related activities as a means of compliance. . . .

States have the authority to use block grant funds for expanding and initiating new mental health services. However, according to testimony and reports on the use of Alcohol and Drug Abuse and Mental Health Services Block Grant funds, the use of block grant funds has been overwhelmingly for support of services that existed prior to 1981. The conferees wish to emphasize that since 1981 Alcohol and Drug Abuse and Mental Health Services Block Grant funds have been available for new or expanded services and by inclusion of this new provision wish to emphasize the ability of States to target new services to local needs. Further the conferees note that this new emphasis is compatible with program requirements under 1915(c)(2) (42 U.S.C. 300x-4). (Emphasis added.)

H.R. Conf. Rep. No. 98-1123, 98th Cong., 2d Sess. 21-22, reprinted in 10A U.S. Code Cong. & Ad. News 4022, 4028-29 (Dec. 1984).

These portions of the House Conference Report indicate that Pub. L. No. 98-509 was intended to promote the expansion of existing alcohol and drug abuse services for women, as well as to provide for the initiation of new services, and that it sought to encourage the use of ADMS Block Grant funds for new or expanded services for unserved or underserved areas or groups, as had been authorized since 1981. No existing federal regulation addresses the interpretation of the language with which you are concerned and, as indicated above, there is no reason to anticipate any federal guidance on the question. Further, it is my understanding that the assurances which the state gave under 42 U.S.C. §300x-4(a) in order to receive an ADMS Block Grant were of a general nature and do not restrict the state's ability to construe Section 1916(c)(14) and (15) in the manner outlined above. See 42 U.S.C. §300x-4(d) (providing that the application of a state for an ADMS Block Grant allotment shall include a description of the intended use of the payments and that the description shall be made public "in such manner as to facilitate comment from any person (including any Federal or other public agency)," and providing for revision of the description as necessary to reflect substantial changes).

Based upon the foregoing, I conclude that, in the exercise of duly-authorized functions relating to the procurement and expenditure of the ADMS Block Grant,

and absent direction to the contrary from the federal government, the Director of Mental Health may interpret Section 1916(c)(14) and (15) of the Federal Public Health Service Act, as amended by the Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984, Pub. L. No. 98-509, §§103, 106, 98 Stat. 2353, as permitting the expenditure of the percentages of funds indicated therein for the expansion of existing services or programs to clients for whom services were not previously available. See generally 42 U.S.C. §300x-6 (establishing a procedure by which the Secretary of Health and Human Services may withhold funds from any state which does not use its allotment in accordance with the requirements of federal law and the certification which the state has provided under 42 U.S.C. §300x-4).

Your second question is whether expenditures meeting the five and ten percent annual requirements of Section 1916(c)(14) and (15) may occur over the period of two federal fiscal years. As you note, 42 U.S.C. §300x-2(a)(2) permits ADMS Block Grant funds to be carried over from one fiscal year to the next: "Any amount paid to a State for a fiscal year and remaining unobligated at the end of such year shall remain available to such State for the purposes for which it was made for the next fiscal year." The provisions about which you have inquired do not provide that the indicated percentages must be spent in a given fiscal year. Rather, Section 1916(c)(14) refers to "the amount allotted to a State under this part in any fiscal year" and Section 1916(c)(15) refers to "the [amount] to be used in any fiscal year." If the amount which is so allotted, or designated to be used, is not in fact used by the state during the year for which it is allotted or designated, it may, under 42 U.S.C. §300x-2(a)(2), remain available to the state for the next fiscal year, to be used for the purposes for which it was originally paid to the state. I see no reason why funds which are earmarked as part of the five percent to be used for alcohol and drug abuse services for women under Section 1916(c)(14), or funds which are earmarked as part of the ten percent to be used for mental health services and comprehensive community mental health programs under Section 1916(c)(15), may not remain available for such purposes for an additional fiscal year, if they are not used in the fiscal year during which they are paid to the state. Thus, in answer to your question, I conclude that expenditures meeting the five and ten percent annual requirements may occur over the period of two fiscal years.

It is, therefore, my opinion, and you are hereby advised, that, in the exercise of duly-authorized functions relating to the procurement and expenditure of the Federal Alcohol, Drug Abuse, and Mental Health Services Block Grant, and absent direction to the contrary from the federal government, the Director of Mental Health may interpret Section 1916(c)(14) and (15) of the Federal Public Health Service Act, as amended by the Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984, Pub. L. No. 98-509, §§103, 106, 98 Stat. 2353, as permitting the expenditure of the percentages of funds indicated therein for the expansion of existing services or programs to clients for whom services were not previously available, and may construe such Section 1916(c)(14) and (15) as permitting expenditures meeting the annual percentage requirements set forth in Section 1916(c)(14) and (15) to occur over a period of two fiscal years.